

<sup>2</sup> The Board notes that appellant submitted additional evidence to OWCP following the December 10, 2020 decision. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On October 12, 2017 appellant, then a 59-year-old medical administration officer, filed an occupational disease claim (Form CA-2) alleging that on or before April 20, 2007 she sustained an emotional condition caused by a hostile work environment due to factors of her federal employment. She stopped work on October 2, 2017. In an October 5, 2017 statement, appellant alleged a pattern of hostility, retaliation, and discrimination by managers that continued from April 2007 through October 2, 2017. She also alleged that, during periods of recuperation from a nonoccupational condition, managers assigned portions of her duties to other employees, and excluded her from important workplace communication.

In support of her claim, appellant submitted an October 23, 2017 report by Dr. Stephen Samuelson, a Board-certified psychiatrist and neurologist, who treated her for depression beginning on April 20, 2007. Dr. Samuelson noted that appellant had been treated by other providers for preexisting depression commencing in 1993. He related appellant's account of managerial harassment and discrimination from 2007 onward, with incidents of supervisors yelling at her and ridiculing her beginning in mid-2014. Appellant had filed an Equal Employment Opportunity (EEO) claim on October 1, 2014. Dr. Samuelson opined that managerial harassment and discrimination, beginning in April 2007, destabilized appellant's preexisting depression, causing a progressive mental decline since 2012 with depression, severe anxiety, and paranoia. He noted that appellant's condition required ongoing treatment and additional medications that would not have been necessary, but for her work-related stressors.<sup>3</sup>

In a December 20, 2017 statement, the employing establishment controverted the claim. It generally denied appellant's allegations of harassment and retaliation. The employing establishment indicated that appellant had been assigned as a greeter in October 2017 based on work limitations for several occupational and nonoccupational conditions that prevented her from continuing in her date-of-injury job.

By decision dated December 22, 2017, OWCP denied appellant's claim, finding that she had not established fact of injury as the evidence of record did not support that the identified workplace events occurred as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 27, 2018 appellant requested reconsideration. She submitted e-mails to and from her supervisors dated from May 2011 through August 2015 regarding leave requests, a prior compensation claim, communication policies, and a performance appraisal. Appellant alleged a pattern of harassment and discrimination by supervisors J.A., L.N., and J.M., including denial of multiple promotions in favor of younger coworkers, and exclusion from informational meetings. She also provided EEO documents alleging that managers gave coworker J.A. assignments needed to be preselected for a position that appellant felt should be hers due to expertise and seniority.

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<sup>3</sup> Appellant retired from the employing establishment on November 30, 2017.

By decision dated October 25, 2019, OWCP denied modification of its December 22, 2017 decision.

On December 26, 2019 appellant requested reconsideration. She submitted additional factual and medical evidence.

Appellant submitted a September 30, 2019 EEO judgment and November 13, 2019 final order, finding that the employing establishment discriminated against her based on her race and age when, on July 25, 2014, Manager J.A. informed her that she had not been accepted for the Medical Administration Officer/Business Office Manager position.

In a statement of accepted facts (SOAF) dated June 22, 2020, OWCP accepted, as compensable, that the employing establishment had discriminated against appellant based on her race and age. It found that the remainder of appellant's allegations had not been established as factual.

In a July 1, 2020 letter, OWCP requested that Dr. Samuelson review the SOAF and provide an opinion as to whether the accepted discrimination caused or contributed to the claimed emotional condition.

On September 21, 2020 OWCP obtained a second opinion on the causal relationship of appellant's emotional condition from Dr. Sanford Edward Pomerantz, a Board-certified psychiatrist and neurologist. Dr. Pomerantz reviewed medical records and the SOAF, and conducted a telephonic examination. He obtained a subjective Beck depression score of 30, indicating moderate depression, which did not fully correlate with the lack of objective dysfunction on examination. Dr. Pomerantz opined that work factors "may have" caused a temporary aggravation of major depressive disorder that was currently resolved, although appellant required continued medication for depression. He released appellant to full, unrestricted duty.

By decision dated October 22, 2020, OWCP vacated its October 25, 2019 decision and accepted a temporary aggravation of preexisting major depressive disorder, resolved as of September 21, 2020, based on Dr. Pomerantz' opinion as the weight of the medical evidence.

By decision of same date, OWCP formally accepted a temporary aggravation of preexisting major depressive disorder, recurrent, moderate.

On December 8, 2020 appellant requested reconsideration. In statements dated December 8 and 9, 2020, she contended that her emotional condition remained active and disabling and that she required additional treatment. Appellant could not claim reimbursement for copays or prescriptions as OWCP had closed the claim. She emphasized that Dr. Samuelson would not release the report OWCP had requested without payment, and that his opinion was crucial to her claim.<sup>4</sup>

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<sup>4</sup> Appellant also presented these arguments in an undated note imaged into the case record on October 23, 2020.

By decision dated December 10, 2020, OWCP denied appellant's reconsideration request of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>5</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>6</sup>

Where OWCP has accepted a resolved aggravation of a preexisting emotional condition, the date by which the condition resolved must be established by probative medical evidence.<sup>7</sup>

FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make the examination.<sup>8</sup> The implementing regulations provide that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 21, 2020. OWCP accepted that appellant sustained a temporary aggravation of preexisting major depressive disorder that resolved no later than September 21, 2020, the date of Dr. Pomerantz' second opinion report. The Board finds, however, that this finding was improper as there was an outstanding conflict of medical opinion between Dr. Pomerantz and Dr. Samuelson, the attending psychiatrist.<sup>10</sup>

Dr. Pomerantz indicated that the accepted discrimination "may have" caused a temporary aggravation of preexisting depression that had resolved no later than September 21, 2020. While he noted that appellant would require ongoing medication management, he did not provide medical rationale distinguishing appellant's preexisting depression from the accepted emotional

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<sup>5</sup> *A.M.*, Docket No. 18-1243 (issued October 7, 2019); *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001); *Alice J. Tysinger*, 51 ECAB 638, 645 (2000).

<sup>6</sup> *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

<sup>7</sup> *J.C.*, Docket No. 13-1200 (issued November 1, 2013); *Daniel A. Davis*, 39 ECAB 151 (1987).

<sup>8</sup> 5 U.S.C. § 8123(a).

<sup>9</sup> 20 C.F.R. § 10.321.

<sup>10</sup> *Daniel A. Davis*, *supra* note 7.

condition.<sup>11</sup> In contrast, Dr. Samuelson, in his November 25, 2017 report, opined that a pattern of managerial harassment and discrimination from April 2007 through mid-2014 destabilized preexisting depression, precipitating a progressive mental decline that required ongoing treatment and additional medications.

As such, the Board finds that a conflict of medical opinion remains relative to this issue. OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.<sup>12</sup> As it failed to resolve the conflict of medical opinion evidence, the Board finds that it failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

### **CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 21, 2020.<sup>13</sup>

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<sup>11</sup> *D.R.*, Docket No. 15-1185 (issued October 8, 2015).

<sup>12</sup> *K.L.*, Docket No. 19-0729 (issued November 6, 2019); *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

<sup>13</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 10 and October 22, 2020 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: August 30, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board